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March 9, 2006

By Facsimile Transmission and By E-Mail

Commodity Procurement Policy & Analysis Division
Farm Service Agency
U.S. Department of Agriculture
1400 Independence Avenue, SW, Rm. 5755-S
Washington, D.C. 20250-0512

Attn: Richard Chavez

Re: Notice of Proposed Rule re Procurement of Commodities for Foreign
Donation, RIN 0560-AH39, 70 Fed. Reg. 74,717 (Dec. 16, 2005)

Dear Mr. Chavez:

Thank you for the opportunity to comment on the above-referenced Notice (the "NPRM"). The following comments are submitted on behalf of our client Liberty Maritime Corporation ("Liberty").

Liberty is the operator of U.S.-flag vessels principally engaged in the transportation of agricultural commodities procured in accordance with the rule that would be amended by the NPRM. The NPRM proposes to modify significantly that rule which governs the methodology for the procurement of commodities and, in effect, ocean transportation services. Thus, the rule will have a significant impact on Liberty.

Liberty commends the Commodity Credit Corporation ("CCC") for taking the initiative to streamline the process of procuring commodities and ocean transportation services. Much of what is procured by the Kansas City Commodity Office ("KCCO") for shipment overseas under the current rule is intended for emergency famine relief. Liberty supports taking any reasonable, lawful action that would expedite the shipment of commodities for famine and other relief.

Liberty also commends CCC for recognizing that the two-step process for the procurement of commodities positioned to result in the lowest landed cost is cumbersome and results in unnecessary administrative burdens at CCC. The NPRM also recognizes that the two-

step process does not always result in the commodities being purchased and shipped at the lowest landed cost.

Overall Purpose of the Proposed Rule. Liberty agrees with the observation in the NPRM that the two-step process can result in commodities being purchased for delivery to a location that does not ultimately result in the lowest landed cost. This arises, in part, from the ability of transportation providers to offer indications of interest for which they are not held accountable. A single-step process should help alleviate this problem, and therefore Liberty supports the move to a single-step process.

Availability of Shipment from Ocean Ports. The preamble to the proposed rule indicates that "[o]ffers of commodities and freight would be invited on a 'bid-point' basis." Liberty supports this concept so long as bid-points include points within ocean ports, as is the case today. If commodities are only made available for shipment from inland ports, this will reduce competition for ocean transportation services and thereby increase the cost to the program for such services. To preserve the widest range of options and to stimulate the greatest competition, CCC should continue to require commodity suppliers to include bid-points within ocean ports.

Application of Cargo Preference Requirements. The NPRM preamble notes that there are cargo preference requirements, which are administered by the U.S. Maritime Administration, that also apply to the procurement of ocean transportation services. Those requirements are not referenced in the text of the proposed rule.

The Cargo Preference Act of 1954, as amended, is of vital importance to Liberty, the U.S.-flag industry and, as indicated many times by the President and the U.S. Congress, to our country. Substantially all of the U.S.-flag vessels engaged in the international commercial trade have carried U.S. Government food aid.

As Congress indicated in 1954, the purpose of the Cargo Preference Act "is to implement the policy established in the Merchant Marine Act, 1936, that the United States should have a merchant marine sufficient to carry a substantial portion of its waterborne export and import foreign commerce." H. Rep. 2329, 83rd Cong., 2d Sess. (1954). That purpose has the same vigor today as it did 50 years ago.

The Cargo Preference Act of 1954, as amended, speaks, of course, to every U.S. Government agency which arranges for U.S. Government-impelled movements of cargo. Every department and agency engaged in such arrangements is responsible for complying with cargo preference requirements under the overall supervision of the U.S. Department of Transportation. See 46 U.S.C. app. § 1241(b)(2). DOT has delegated this responsibility to the U.S. Maritime Administration. 49 C.F.R. § 1.66(e).

There is no doubt that MarAd has primacy with respect to the administration of the Cargo Preference Act of 1954. This was confirmed by the U.S. Department of Justice in an April 19, 1994 memorandum issued to DOT on the issue of "MARAD Rulemaking Authority Under

Cargo Preference Laws." The Justice Department indicated, among other things, that the law gives MarAd "substantial authority and leeway in imposing a degree of uniformity upon other departments and agencies in the administration of their cargo preference programs."

Liberty urges CCC to remain mindful of its cargo preference obligations and MarAd's statutorily mandated role, and urges CCC to reflect the necessity to comply with cargo preference requirements in the final rule or the preamble to that rule. The NPRM indicates that the "cargo preference requirements would be determined initially and not subject to change of carriers." It is unclear as to how those requirements would be applied, and the proposed rule does not provide any guidance or parameters. Liberty recommends that CCC explain how cargo preference requirements will be applied and complied with before CCC proceed to a final rule.

Necessity for Public Comment. CCC concludes in the NPRM that "CCC is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule." 70 Fed. Reg. 74,717, 74,719. Liberty does not agree with this conclusion, although finds it difficult to dispute without knowing CCC's reasoning. The NPRM does not contain a reason for this conclusion. As we expect CCC understands, there is substantial case law for the proposition that an agency's characterization of whether an activity is subject to notice and comment requirements is not dispositive. Liberty therefore requests that CCC produce its reasoning for concluding that notice and comment protections do not apply to the subject matter of the NPRM.

FBES. The NPRM also indicates that the proposed rule is part of a process by KCCO to update is computerized bid evaluation systems. One of those systems is the Freight Bid Entry System ("FBES").

FBES has the potential to be a very important development in the procurement of commodities and ocean transportation and other services for the foreign assistance programs to which it will be applied. It will integrate and potentially make seamless a complicated process of assessment, evaluation and procurement. The economic, legal and policy considerations that will be automated are numerous. They derive from a number of statutes, regulations, directives, interpretations etc. Many of these legal requirements are not immediately within CCC's purview or authority.

Despite its importance, FBES has, to date, been developed without significant industry input. A general description of FBES was provided at a food-aid conference in May 2005, but that description does not substitute for a formal proposal subject to comment. Even that general description was preliminary and the system being described was subject to change.

Similarly, a public meeting was held on February 21 at USDA headquarters. This was a useful meeting, and Liberty appreciates CCC's effort to maintain open lines of communication regarding the proposed rule. However, it was made clear at the meeting that the subject of FBES and regulatory activity that follows-on to the proposed rule was a subject outside the scope of the

public meeting. As a result, that meeting was not a substitute for meaningful public communication regarding FBES implementation.

Liberty urges USDA to have a dialogue with affected private persons with regard to the implementation of FBES. FBES is too important and significant a system to be developed, tested, adopted and implemented without the input of affected persons. Liberty believes that the law requires such input in the form of rulemaking adopted with the benefit of notice and comment. The adoption of the myriad rules and processes necessary to implement FBES, including cargo preference laws, are simply not exempt from public notice and comment.

Even aside from the legal framework, it is good business and prudent policy to ensure that CCC obtains the benefit of various viewpoints so as to help ensure that the system is functional, accomplishes what it is intended to do and is supported by the affected industry. Therefore, the development of FBES should be as transparent as possible. This should occur both because it is required and because it is the best course.

Until more information is available regarding FBES, Liberty reserves the right to provide additional comments on the NPRM. The right to provide comment on the NPRM does not, and cannot, substitute for the right to comment on what is equally important, namely the creation of FBES. FBES has the potential to affect significantly the outcome of ocean transportation procurements. It is only fair that Liberty, and other affected persons, have an opportunity to participate in the FBES formulation and testing process to ensure that one segment or another of the industry is not disadvantaged in some unanticipated way.

Liberty is well aware that CCC has devoted considerable time and resources to FBES, and Liberty is supportive of that effort. Liberty also applauds CCC's persistence in pursuing improvements that should benefit the very important underlying foreign assistance programs. Liberty stands ready to assist and urges CCC to give the affected industry the opportunity to do so.

Thank you for your consideration of these comments. Liberty appreciates the opportunity to provide its views.

Very truly yours,



Constantine G. Papavizas
Counsel to Liberty Maritime Corporation